8 PERC ¶ 15009

SAN DIEGO COMMUNITY COLLEGE DISTRICT

California Public Employment Relations Board

San Diego Community College Teachers Association, CTA/NEA, Charging Party, v. San Diego Community College District, Respondent.

Docket No. LA-CE-1410

Order No. 368

December 22, 1983

Before Gluck, Chairperson; Morgenstern and Burt, Members

Refusal To Bargain -- Refusal To Comply With Grievance Settlement -- Apparent Authority Of Negotiator -- -- 09.113, 09.114, 47.17, 72.530 Teachers' union's charge, alleging that school district failed to bargain in good faith by refusing to comply with terms of grievance settlement negotiated at bargaining table, was dismissed where evidence did not support union's claim that district's negotiator had authority to enter into binding settlement agreement. Since union was aware that agreements reached at bargaining table were tentative and were subject to approval of school board, there was no basis for union's belief that district's negotiator had greater authority with respect to grievance settlements. Union's claim, that alleged settlement agreement, under which district was to issue employment contracts to certain individual teachers, was ratified by district, was rejected. Fact that school district's staff undertook to prepare such contracts was not evidence of ratification because at no time did school board of trustees act upon alleged settlement.

Discrimination -- Refusal To Approve Employment Contract -- Treatment Of Similarly Situated Employees -- -- 72.311, 72.318, 72.323, 72.339 School district unlawfully refused to approve teaching contracts of two union officials where evidence indicated that district was motivated by displeasure with presentation of one official in protest of proposal concerning wage stipend for faculty senate officers. District claimed that teaching contracts were not approved because terms were established as result of alleged grievance settlement and that district had policy against such "backdoor contracts." However, evidence showed that district did not always apply alleged policy and approved such contracts in past. Although district noted that contract of second official, who did not participate in stipend protest, was also not approved, in light of district's failure to establish existence of policy against backdoor contracts in instant circumstances, district's refusal to approve second official's contract was deemed pretextual justification for unlawfully motivated conduct.

Interference -- Union's Right To Represent Members -- Burden Of Proof -- -- 72.131 Where union failed to present affirmative evidence that its right as exclusive representative under EERA Section 3543.5(b) to represent its members was adversely affected by district's refusal to approve teaching contract of union official, charge was dismissed.

Unfair Practice Procedures -- Amendment Of Charge -- Prejudice -- -- 71.223 Teachers' union was not permitted, via post-hearing brief, to amend unfair practice charge to allege that school district unilaterally altered its faculty senate stipend policy in violation of its duty to bargain in good faith. Since original charge alleged refusal to comply with grievance

settlement and interference with protected rights, parties did not litigate issue of unilateral change, and district would suffer unjust prejudice if amendment were permitted.

APPEARANCES:

Charles R. Gustafson, Attorney for San Diego Community College Teachers Association, CTA/NEA; Larry J. Frierson, Attorney (Liebert, Cassidy & Frierson) for the San Diego Community College District.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision of an administrative law judge (ALJ) [see 6 PERC 13219 (1982)] filed by the San Diego Community College District (District) and a response to those exceptions filed by the San Diego Community College Teachers Association, CTA/NEA (CTA). The ALJ found that the District board of trustees discriminated against two employees in violation of the Educational Employment Relations Act (EERA or Act)1 by refusing to ratify two grievance settlement agreements because one of the grievants exercised her right protected by EERA, to address the board on behalf of CTA.

The District excepts to numerous findings of fact made by the ALJ, to his analysis, finding of violation and proposed remedy.

The Board has reviewed the proposed decision in light of the District's exceptions, the response thereto, and the entire record in this matter. We find that the ALJ's findings of fact are free of prejudicial error and adopt them as the findings of the Board itself. We affirm the ALJ's conclusions of law and modify the proposed remedy, consistent with the following discussion.

FACTS

For more than six years, John Couch and Maureen Keegan were employed by the District as part-time instructors, also referred to as "hourly" or "evening" instructors. They taught three classes, equivalent to 60 percent of a full-time assignment.2

CTA represents approximately 500 full-time and 1,500 part-time instructors employed by the District and had negotiated a collective bargaining agreement covering those employees for the period July 1, 1980 to June 30, 1981. Part-time faculty are represented on the CTA executive board and negotiating committee by the Hourly Faculty Association (Association). Part-time faculty are also represented on certain matters by the Hourly Faculty Senate. At all times relevant to this case, Couch and Keegan were active members and officers of both organizations.

In 1979-80, both employees served on the executive board of the Association, while Couch was president of the Hourly Faculty Senate and Keegan was president-elect. In 1980-81, Couch became president of the Association. Keegan remained on the Association executive board and became president of the Hourly Faculty Senate. She also served on the CTA negotiating team both years.

Each campus in the District also has a full-time faculty senate. Full-time senate officers are granted released time for the performance of senatorial duties. Until January 1981, Hourly Faculty Senate officers received a stipend for the performance of senatorial duties. The stipend was based on a designated number of hours calculated at the nonclassroom rate of pay, which is less than the classroom rate.

In July 1979, as incoming Hourly Faculty Senate president, Couch wrote to the Chancellor requesting an increase in compensation for the officers of the Hourly Faculty Senate to a level of "parity" with the full-time senates. He sought either more hours of compensation or a full-time contract for the president and a partial contract for the president-elect, with released time on par with the full-time senate officers. Couch believed that they were entitled to contracts because their combined teaching and senatorial duties exceeded 60 percent of full-time.

Provost Lawrence Davenport responded by letter on October 3, 1979, indicating that, in the future, Hourly Faculty Senate officers would receive released time instead of a stipend, with the result that their total assignment would not exceed 60 percent of a full load. Couch and Keegan met with Davenport and objected to this change because it would affect classes already underway and would decrease their overall compensation. Davenport claimed that the existing practice violated the 60-percent rule of the Education Code and would permit them to claim a right to a full-time contract.

Pay warrants received by Couch and Keegan in October did not include the stipend. They both filed grievances. Couch's grievance complained of violations of the collective bargaining agreement and the 60-percent rule of the Education Code, and requested a 77-percent contract effective September 1, 1978 with back pay, and a full contract effective September 1, 1979.

Couch and Keegan subsequently received payment of the stipend for October and for the rest of the fall semester, and the change in senatorial compensation announced on October 3, 1979 was not implemented until January 1981.

On November 21, 1979, William Ramstad, Director of Personnel Services, returned the grievances, stating that a violation of the Education Code was not grievable under the contract. Ramstad also conducted an audit of their hours and concluded that service rendered by senate officers was not part of the classroom teaching assignment and that they, therefore, had not exceeded the 60-percent rule and were not entitled to contracts.

Nevertheless, on December 2, 1980, the grievances went to arbitration. After presentation of CTA's case, the hearing was adjourned to be resumed at a later date.

Following adjournment, the District's Director of Administrative Services and chief negotiator, Cecil J. Hannan, met with CTA Attorney Daniel R. Saling, CTA President Carolyn Pickering, and CTA Field Representative Lola Buie, and offered to settle the grievances by providing 60-percent contracts for both Couch and Keegan. After conferring with the grievants, Saling relayed their acceptance to Hannan.

All of the CTA witnesses present during this meeting testified that Hannan gave no indication that board approval of the settlement agreements would be required. Hannan testified that he said he would "recommend the settlement," but he could not recall if he indicated to whom he would make this recommendation.

Settlement agreements were subsequently prepared by the District's counsel, and stated in pertinent part as follows:

> [R]espondent San Diego Community College District hereby offers to grant grievant a 60% contract as a contract employee effective the first day of the Spring Semester of 1981,
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> . . .
>
> The undersigned further agrees that by accepting District's offer, he will receive continuing employment rights which he would not otherwise be entitled to. . . .

Couch and Keegan executed the agreements on December 23, 1980. Other signatories were Pickering and Saling for CTA, Hannan for the District, and Ellen R. Michaels for the County Counsel, as attorney for the District. The agreements contained no indication that approval or ratification by the board of trustees was required.

At a January 14, 1981 board meeting, Keegan spoke as part of the CTA presentation, objecting to a District salary proposal advanced during contract negotiations which would have created a three-tier contract system.

Sometime between the 16th and 20th of January, Hannan told Pickering that contracts for Couch and Keegan were being prepared. Also sometime in January, CTA advised the arbitrator that the

grievance had been settled.

On January 20, Keegan was told by her supervisor that she would have to cut two of her three classes or resign as Hourly Faculty Senate president. Keegan wrote to the Chancellor offering to serve without pay, and was told that under no condition could she continue her Senate presidency.

On January 21, Keegan informed the CTA executive board of the demand for her resignation and told them she was going to address the situation at the board of trustees' January 28 meeting. Keegan testified that she also protested the demand for her resignation at a District Executive Council meeting on the same date and that Hannan responded that, with what she had received which was "the same as a contract," she could take released time.

On or about January 22, 1981, Couch went to the District personnel office and signed a standard form contract of employment.3 He then passed Hannan in the building and Hannan said, "Congratulations on your contract, and it won't be long before you'll have a full-time."

Shortly thereafter, Couch told Keegan he had signed a contract and encouraged her to inquire about her contract. When she called the personnel office, she was told that there was no contract for her.

On January 27, Keegan resigned as Hourly Faculty Senate president. Consequently, she did not get a stipend for the spring semester, amounting to about $3,000. Rachel Daniels, president-elect of the Senate, also resigned her office rather than cut her teaching load.

On January 28, Keegan appeared before the board of trustees and complained about this policy which forced her resignation and which, she said, was taking away the leadership of the Hourly Faculty Senate and "effectively would take away our bargaining power." She also stated that "no one . . . wants to have back-door contracts, but if that was the only way [teachers] could get contracts, . . . then . . . that's the way it should go." She testified that the board "showed great consternation at the mention of back-door contracts" and then went into executive session.4

On January 29, Keegan and Rachel Daniels went to Hannan's office at his invitation. Both testified that Hannan became quite emotional and told Keegan that she had "blown it" and would not get a contract because of what she had said at the meeting. On January 30, Hannan told Couch that Keegan's speech had threatened the validity of the settlement agreements, and possibly undermined any contract being upheld, but that every effort would be made to protect Couch's contract because it was already signed. Also on the 29th or 30th of January, Hannan told Pickering that Keegan "blew it" by her speech to the board on the 28th. According to Pickering, "He (Hannan) was angry, and as he spoke, he seemed to get a little heated up a little bit about it, and say, you know, that her remarks were injudicious, that the Board was upset by her remarks, and that there--then there would be no contract for her."

On or about January 30, Keegan received notice that the settlement agreements would be submitted to the board on Wednesday, February 4, 1981. Keegan was told that it was not an open meeting and, therefore, did not attend. Keegan and Couch were both notified in writing on February 5, 1981 that the board had declined to ratify the proposed settlement agreements. No reason for the action was stated.

When he learned of the board's action, Saling called Hannan. According to Saling, Hannan said that the board had decided not to ratify the agreements because they were angry at Keegan for her statements of January 28. According to Saling, Hannan also said, "Boy, did she blow it," and "if she had only kept her mouth shut."

Hannan denied telling Saling that the board was angry, stating that he "had no basis to know the board was angry." He testified that "to his knowledge" Keegan's presentation did not keep her from getting a contract and that he saw no relationship between her presentation and the board action. Hannan admitted talking to Keegan and to Saling about the presentation, saying that he did not think such hostility would help in reaching an acceptance resolution of the issues. While he denied saying that Keegan had "blown it," as testified by Keegan, Daniels, Pickering and

Saling, he testified as follows:

> I have mentioned that--that she would blow like a volcano . . . I think I probably on a number of occasions said that she blew again whenever one of these eruptions would occur.5

The record establishes that the District's regular procedure for hiring contract employees is to advertise for the position, submit applications to a screening committee which includes an affirmative action representative, and submit the hiring administrator's selection and hiring recommendation to the board. Hourly employees are hired without the entire screening process but with board approval. Thus, all employment contracts require board approval, as do all tentative agreements reached at the bargaining table.

"Back-door" contracts are contracts granted other than through the District's regular hiring procedure. Hannan testified that the board is opposed to the use of back-door contracts because "it circumvents the District's affirmative action policy. It does not necessarily line up with their view of the District needs. And it circumvents the regular hiring policy that they have adopted." However, Hannan testified that "back-door" contracts had been given in the past to persons who had exceeded the 60-percent limit--either as a result of court orders, or as a result of "discussions" with another employee organization regarding persons falling within the *Peralta* rule. (See footnote 2, *supra.*) Ramstad testified that the board of trustees had approved every back-door contract he recommended, except those of John Couch and Maureen Keegan.

DISCUSSION

CTA's charge alleged that the District violated subsections 3543.5(a) and (b) by refusing to honor the settlement agreements because of Keegan's January 28 speech to the board, and also violated subsection 3543.5(c) by refusing to honor the agreements after the District representatives had indicated they had authority to enter into final and binding agreements. After presentation of its case at hearing, CTA moved to amend the charge to allege a unilateral change in the policy of providing stipends to the Hourly Faculty Senate officers. Ruling on the District's objection, the ALJ denied the motion to amend on grounds of surprise and prejudice to the District.

Applying the test for discrimination set forth in *Novato Unified School District* (4/30/82) PERB Decision No. 210, 6 PERC 13114, the ALJ concluded that the District's conduct violated subsection 3543.5(a) of EERA. He dismissed the (b) charge, finding that CTA had failed to provide affirmative evidence as required under *Novato, supra,* that *its* rights had been adversely affected by the actions against Couch and Keegan. He also dismissed the (c) charge, finding that Hannan did not possess apparent authority to commit the District to the settlement agreement, and that the board did not ratify the agreement by providing Couch with a contract of employment. Finally, the ALJ reaffirmed his denial of CTA's motion to amend.

In its response to the District's exceptions, CTA generally supports the ALJ's finding of violation, but also asserts that it is entitled to prevail on all issues raised in its brief, which it incorporates by reference into its response. Assuming that CTA's response is intended as a statement of exceptions to the ALJ's dismissal of its (b) and (c) charges and his refusal to consider the alleged unilateral change, we find this response lacking in sufficient specificity to be considered as a statement of exceptions under PERB regulations.6 We, therefore, do not consider CTA's response and affirm the ALJ's dismissal of these charges.

By way of its brief and exceptions, the District claims that, consistent with its policy against "back-door" contracts, it would have rejected the settlement agreements even in the absence of Keegan's presentation. It excepts to each step of the ALJ's application of the *Novato* test, to his finding of violation, and to his proposed remedy. While we agree with the District that the ALJ erred in his application of the *Novato* test in a number of particulars, nonetheless, upon a proper application of that test, we conclude that the finding of violation must be, and is, affirmed.

In *Novato,* the Board adopted the test for discrimination or reprisal articulated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Lines, Inc.* (1980) 251 NLRB No. 150 [105 LRRM 1169] aff. *NLRB v. Transportation Management Corp.* (1983(__ U.S. __ [113 LRRM 2857]. There, we held that the charging party has the burden of showing that the employee engaged in protected activity, and that the protected conduct was a motivating factor in the employer's decision to take adverse action. Accordingly, unlawful motive is the specific nexus required in the establishment of a prima facie case. The Board recognized that direct proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. We stated as follows:

> To justify such an inference, the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity. (Citation omitted.) Knowledge along with other factors may support the inference of unlawful motive. The timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive. In general, the inference can be drawn from a review of the record as a whole.

If the charging party can raise, by direct or circumstantial evidence, the inference that there is a nexus between the employee's protected activity and the adverse personnel action, the burden shifts to the employer to show that it would have taken such action regardless of the employee's participation in protected activity.

The District initially excepts to the ALJ's finding that Keegan's January 28 speech constituted protected participation in CTA activity. The ALJ reasoned that, because Keegan was, at all relevant times, the hourly faculty representative to CTA, and because her January 14 speech as a CTA spokesperson was protected, she retained that protected status when she spoke on January 28. The District argues that, on January 28, Keegan was acting not as a CTA spokesperson but on behalf of the Hourly Faculty Senate which, it claims, is not an employee organization under the Act. While conceding that Keegan spoke on CTA's behalf on January 14, it argues that this earlier speech "should not be considered to create an everlasting mantle of protection on her activity." Finally, the District claims that the subject of her speech, the effect of District policies on the leadership of the Hourly Faculty Senate, is not a matter related to employer-employee relations.

The District's exceptions on this matter are lacking in merit. The subject of Keegan's speech, concerning the wages and hours of those unit employees who were officers of the Hourly Faculty Senate, clearly falls within the definition of "employment relations" as stated in *King City Joint Union High School District* (3/3/82) PERB Decision No. 197, 6 PERC 13065 and *Sierra Joint Community College District* (9/22/83) PERB Decision No. 345, 7 PERC 14255.

In addition, the ALJ properly found that Keegan represented CTA when she spoke on January 28. In *Santa Monica Unified School District* (12/10/80) PERB Decision No. 147, 5 PERC 12003, the Board affirmed the hearing officer's decision which stated, in pertinent part, as follows, at pp. 16-17:

> Officers of employee organizations should be presumed to be acting with the authorization of and on behalf of the organization on those matters which even remotely relate to the goals or interests of the organization. If the determination of "organizational activity" were dependent upon specific authorization, the natural result would be that public school employers and the PERB would be required to continuously monitor the internal affairs of employee organizations in

> order to ascertain whether an individual had been properly authorized to act on behalf of the organization. This is hardly the function of either public agency.

Since Keegan was a member of CTA's executive board and negotiating committee, she is presumed to have been acting on its behalf. *Santa Monica, supra.* Moreover, by discussing the demand for her resignation with the CTA executive board and informing them she was going to make a presentation on the matter to the board of trustees, Keegan acquired CTA's authorization to act on its behalf. We, therefore, find that Keegan's January 28 speech was protected CTA activity.7

The District next disputes the ALJ's finding of a nexus between Keegan's January 14 presentation and the District's failure to provide her with an employment contract while providing Couch with such a contract. We agree that the ALJ erred in this portion of his analysis, and we expressly disavow his reasoning. The conduct complained of in the charge consists of the board's refusal to ratify the settlement agreements. Thus, under *Novato,* a nexus must be established between *this* conduct and Keegan's protected activity. The District's earlier failure to provide Keegan with an employment contract is irrelevant to this determination.

The District next excepts to the ALJ's finding that the evidence is sufficient to raise an inference that Keegan's January 28 speech was a motivating factor in the board's decision to refuse to ratify Keegan and Couch's settlement agreements. In support of this inference, the ALJ noted Hannan's reaction to Keegan's presentation, evidence of disparate treatment in that the District had previously approved similar "back-door" contracts, and timing in that the board deferred action on the settlement agreements until Keegan had made her presentation.

The District denies any disparate treatment, claiming it treated Keegan and Couch identically, it had never granted contract status for senatorial service, and that any previous back-door contracts were granted pursuant to court order or through negotiations to resolve litigation. The District argues that it did not depart from its established procedure of requiring board approval for employment contracts, and did not offer inconsistent or contrary justifications for its action. It denies that the board unduly delayed in considering the matter, claiming that any delay was consistent with its policy of considering personnel matters once a month and was reasonable in light of the complexity of the issue.

We find that an inference of unlawful motivation is fairly raised by the facts presented here. In addition to the board's knowledge of Keegan's protected activity occurring in its presence, Hannan's statements following Keegan's speech constitute strong evidence of unlawful motivation. Timing, belated justification, and disparate treatment are also factors which support this inference.

Immediately following Keegan's speech, the board adjourned to executive session, with Hannan in attendance. Over the next two days, Hannan told Keegan, Daniels and Pickering that Keegan had "blown it" by her speech and would not get a contract as a result. According to Pickering, Hannan said, "the board was upset by her remarks, and . . . there would be no contract for her." According to Couch, Hannan told him that Keegan's speech had threatened the validity of the settlement agreements and possibly undermined any contract being upheld but that every effort would be made to protect Couch's contract because it was already signed. According to Saling, after the board's action on February 4, Hannan told him that the board had decided not to ratify the agreements because they were angry at Keegan for her statements of January 28.

Hannan's contemporaneous comments must be construed as reflecting his perception of the board's discussions in executive sessions at which he was present, both immediately following Keegan's presentation on January 28 and again on February 4 when they decided to reject the agreements. These statements provide strong evidence that the board reacted angrily to Keegan's speech, and that the speech was a motivating factor in its rejection of the settlement agreements.

While the District correctly states that it did not offer inconsistent or contrary justifications for its

actions, this is true because, in fact, it offered *no* justification at the time it took the action. As we found in *Novato, supra,* a respondent's failure to offer justification to an aggrieved employee at the time it takes action against him is relevant in deducing improper motive. Indeed, in the instant case, the District *at no time* provided any testimony or other direct evidence of motivation. Rather, its claims in this regard are presented entirely through legal argument. Such belated justification appears to be an attempt to legitimize its decision after the fact, and also supports an inference of unlawful motivation. *Novato, supra.*

In addition, timing supports an inference of unlawful motive, though not for the reasons stated by the ALJ. As indicated above, we do not attach any significance to the date on which Hannan presented the settlement agreements to the board. However, we do find that the close proximity in time between Keegan's presentation on January 28 and the board's rejection of the settlement agreements on February 4 evidences unlawful motive.

Finally, we find evidence of disparate settlement in that the District had previously approved other "back-door" contracts and had never previously rejected such a contract recommended by Ramstad. As the District claims, these prior back-door contracts occurred either as a result of court orders or through settlements, both involving hourly employees falling within the *Peralta* rule. However, the District itself characterizes the instant contracts as resulting from settlement of grievances relating to *Peralta.*8 Thus, the contracts denied here are sufficiently similar to those approved in the past to establish disparate treatment in this case.

The acts that the board refused to ratify Couch's agreement though he made no presentation before it, does not, as the District argues, demonstrate either the absence of disparate treatment or adherence to a policy against backdoor contracts. Rather we must conclude, as did the ALJ, that the refusal to ratify Couch's contract "was a pretext to retain consistency between treatment of Keegan and Couch, where no justifiable difference, other than Keegan's presentations, existed between the two." Hannan's comments to Couch clearly indicated that Couch's contract, as well as Keegan's, was threatened by Keegan's speech. The elements of timing, belated justification, and disparate treatment apply equally to both employees.

For all of these reasons, the Board draws the inference that Keegan's January 28 speech as a motivating factor in the board's rejection of both Keegan's and Couch's settlement agreements.

The District excepts to the ALJ's finding that it failed to rebut the difference of unlawful motivation. It reasserts its argument, rejected by the ALJ, that the board refused to ratify the settlement agreements because of its opposition to "back-door contracts," and that it would have rejected the contracts even in the absence of Keegan's presentation.

We are unpersuaded by the District's argument. Though the District proved that it had a general policy against "back-door" contracts, it failed to produce any evidence that this policy played any part in the board's decision. Rather, the evidence indicates that an exception to the policy had been established in circumstances similar to those presented here, and that the District administrators acted as if these settlement agreements fell within that established exception and were not subject to the general policy.

Hannan had been employed as District Director of Administrative Services for six years, Ramstad as Director of Personnel Services for seven years. If the board policy opposing back-door contracts applied so as to prevent approval of these settlement agreements, certainly Hannan and Ramstad would have been award of it. However, their entire course of conduct, and that of the District's counsel, is inconsistent with such application of the policy.

Hannan made the offer of 60-percent contracts on December 2. The District's counsel prepared settlement agreements and signed them, along with Hannan, for the District. Hannan subsequently told Pickering that contracts for Couch and Keegan were being prepared. On January 21, Hannan told Keegan that what she had received was "the same as a contract." On January 22, Couch executed a contract of employment which was also signed by Ramstad and

which stated, in part, "your acceptance of this offer will be considered binding." That same day, Hannan congratulated Couch on his contract, saying "[I]t won't be long before you'll have a full-time." At no time did Hannan, Ramstad or the District's counsel suggest any potential conflict with a board policy against approving such contracts.

Contrary to the District's contention, the absence of proof of board knowledge of this administrative course of conduct does not render it irrelevant. It is relevant, probative evidence that, prior to January 28, Hannan, Ramstad and the District's counsel, all of whom were in a position to be knowledgeable regarding District policies, were unaware of either the existence of a firm policy against back-door contracts or its applicability to these circumstances. Rather, this extensive course of conduct evidences an understanding that these settlement agreements, like the earlier *Peralta* cases, constituted an exception to the general policy.

The District failed to explain why these administrators and legal counsel labored under such misapprehension or why these contracts did not come within the *Peralta* exception. In addition, the District failed to produce any direct evidence that the board relied on the policy in this case. The notice of the board's action received by Couch and Keegan on February 4 contains no statement of the reason for the action. No minutes of the board meeting were introduced into evidence; no member of the board testified. While Hannan testified as to the existence of the policy, he did not indicate that the board considered the policy in reaching its decision, though he was presented at its meeting.

The burden of rebutting the inference of unlawful motive is placed on the employer in "recognition of the practical reality that the employer is the party with the best access to proof of its motivation." *Wright Line, supra,* 251 NLRB at 1087-1088. Given the District's access to evidence of motivation, proof of the mere existence of a general policy fails to satisfy its burden in the circumstances presented here. In sum, the District has failed to show that its action would have been the same absent Keegan's protected activity. We, therefore, affirm the ALJ's conclusion that the District violated subsection 3543.5(a).

REMEDY

The ALJ ordered the District to offer Keegan and Couch contract status pursuant to the settlement agreements retroactive to the term beginning February 26, 1981, and to tender back pay with interest retroactive to that date.

The District excepts, claiming first that PERB lacks jurisdiction to order the employment of a particular individual, a matter reserved exclusively to the school board by the Education Code.

This exception is groundless. PERB is statutorily empowered to issue a decision and order.

> directing an offending party . . . to take such affirmative action, including but not limited to the *reinstatement of employees* with or without back pay, as will effectuate the policies of this chapter. (Emphasis added.) (Subsection 3541.5(c).)

We have previously applied this section to order the hiring of a teacher who was discriminatorily refused employment, in *Santa Clara Unified School District* (9/26/79) PERB Decision No. 104, 3 PERC 10124. Certainly, we have jurisdiction to fashion a similar remedy here.

The District proposes an alternative remedy ordering it to "reconsider" the settlement agreements without consideration of Keegan's activity. The limited remedy proposed by the District fails to provide full compensation, since we have found that Couch and Keegan were illegally deprived of the contracts themselves, not merely the opportunity to be fairly considered for them. Compare *Lamoore Union High School District* (12/28/82) PERB Decision No. 271, 7 PERC 14026, and *Eastern Sierra Unified School District* (5/24/83) PERB Decision No. 312, 7 PERC 14160.

Finally, the District argues that if Keegan and Couch are given contract status, it should have prospective effect only since otherwise they may gain tenure without undergoing statutory or District evaluation procedures. We find merit in this claim.

The settlement agreements unlawfully rejected by the board would have granted Couch and Keegan contracts for a one-year term. The Education Code provides that "contract" employees in a community college district must serve a probationary period of no less than one year nor more than two years before acquiring "regular" tenured status. After completion of both the first and second contract year, certain evaluation requirements must be satisfied (section 87607) before the governing board "at its discretion" decides whether or not to employ a contract employee as a regular employee (sections 87608, 87609). The governing board must give written notice of its decision and the reasons therefor (section 87610). Failure to give such notice "shall be deemed a decision to employ him as a regular employee for all subsequent academic years."

Considering these sections, in *Mt. San Antonio College Faculty Assn. v. Board of Trustees* (1981) 125 Cal.App.3d 27, 34-35 [177 Cal.Rptr. 810], the Court of Appeal held as follows:

> By labeling the position probationary, the Legislature had clearly advised the employee that the position is neither vested nor permanent. Probation means the teacher is on trial - his competence and suitability remaining to be determined. (See Websters New Internat. Dict. (3d ed. 1961) p. 1806.) Probationary is the opposite of vested. Although the label may not be determinative, it is strong indication of legislative intent not to grant a vested right.
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> The Education Code leaves the final determination as to rehiring probationary teachers with the governing board.

Here, the settlement agreements granted contract status effective January 26, 1981. An order granting contract status retroactive to this date, which is more than two years ago, would in fact result in the granting of "regular" tenured status, pursuant to the above-cited Education Code provisions. Thus, tenure would be granted without satisfaction of the specified evaluation requirements and without the final determination of the governing board as required by the Education Code and *Mt. San Antonio College Faculty Assn. v. Board of Trustees, supra.*

Moreover, the settlement agreements granted only contract or probationary status. Because the award of tenure is a matter within the discretion of the board of trustees, it is not a benefit which would have accrued *automatically* but for the violation. Thus, an order having the effect of granting tenure would provide more than the employees would have received in the absence of the District's unlawful conduct. (Compare *Santa Clara, supra,* where we found that the discriminatee was entitled to full-time employment where the part-time position wrongfully denied had become full time.)

Therefore, we modify the ALJ's proposed order and direct the District to offer contract status *prospectively* beginning next semester. However, we order back pay with interest retroactively to January 26, 1981 to compensate Couch and Keegan for the difference between what they actually earned and what they would have been paid as contract employees absent the District's refusal to ratify the settlement agreements.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case and pursuant to Government Code section 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the San Diego Community College District and its representatives shall:

1. CEASE AND DESIST FROM:

Imposing or threatening to impose reprisals on Maureen Keegan, discriminating or threatening to discriminate against Maureen Keegan or otherwise interfering with, restraining, or coercing Maureen Keegan because of the exercise of her rights to form, join, and participate in the activities of employee organizations of her own choosing for the purpose of representation in all

matters of employer-employee relations.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

a. Offer Maureen Keegan and John Couch contract status pursuant to the executed settlement agreements, beginning the next school year.

b. Tender to Maureen Keegan and John Couch a back payment award which reflects an amount equal to that which they would have been paid absent the District's refusal to ratify the settlement agreements, beginning on January 26, 1981 until the present, with payment of interest at seven percent per annum.

c. Within thirty-five (35) days after the date of service of this Decision, post copies of the Notice to Employees attached as an appendix hereto. Such posting shall be maintained for at least thirty (30) consecutive workdays at its headquarters offices and in conspicuous places at the locations where notices to certificated employees are customarily posted. Reasonable steps shall be taken to insure that it is not reduced in size, defaced, altered or covered by any material.

d. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Member Burt joined in this Decision.

Chairperson Gluck's dissents.

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1 The EERA is codified at Government Code section 3540 *et seq*. Unless otherwise noted, all statutory references are to the Government Code.

2 Education Code section 87482 (formerly section 13337.5), enacted in 1967, provides that part-time community college instructors who teach not more than 60 percent of a full-time assignment are considered temporary employees and have no right to continued employment.

In *Peralta Federation of Teachers v. Peralta Community College District* (1979) 24 Cal.3d 369, the California Supreme Court held that Education Code section 87482 has only prospective effect. Thus, part-time instructors employed prior to enactment of the section in 1967 became probationary contract employees pursuant to Education Code section 87605 (formerly section 13346.05) and, after two years, acquired regular permanent status pursuant to Education Code section 87609 (formerly section 13346.25).

3 The contract provides in pertinent part:

> You are hereby offered employment beginning 1/26/81 and ending 6/5/81, as a/an College Instructor, 60%, 10-month assignment.
>
> This appointment is subject to the provisions of the laws of the State of California, certification requirements of the State of California, the Rules and Regulations of the San Diego Community College District Board of Trustees, and the provisions of the adopted Salary Schedule.
>
> . . .
>
> Please sign and return the original copy of this offer of employment within ten days, indicating acceptance or non-acceptance. If you require additional time to make a decision, you must request an extension of this offer. Your acceptance of this offer will be considered binding. We shall expect you to report for paid duty on 1/26/81.

[4] According to a declaration submitted with the District's exceptions, Hannan first presented the settlement agreements to the board following Keegan's presentation on January 28.

At hearing, Hannan had testified that he believed he presented the proposed settlement agreements to the board sometime before the 20th of January.

The declaration is allegedly based on Hannan's review of certain documents. But the District fails to explain why, in the exercise of reasonable diligence, these documents could not have been produced or consulted during hearing so as to provide CTA with an opportunity for cross-examination and rebuttal. We, therefore, decline to consider this belatedly submitted evidence.

Moreover, we do not find the date on which the agreements were presented to the board critical to the issues in this case, and we do not rely on that date in reaching our decision.

[5] The ALJ resolved the testimonial discrepancy between the CTA witnesses and Hannan in favor of CTA. In addition to the demeanor of the witnesses, he noted that Hannan's response was not a flat denial but rather "equivocal and nonabjective," and that Hannan admitted to using the terms attributed to him. We find the ALJ's characterization of Hannan's testimony amply supported by the record and see no reason to overturn his credibility determination.

[6] PERB regulations are codified at California Administrative Code, title 8, section 31001 *et seq.* Regulation 32310 states in pertinent part:

> . . . The response may contain a statement of any exceptions the responding party wishes to take to the recommended decision. Any such statement of exceptions shall comply in form with the requirements of Section 32300. . . .

Regulation 32300 requires that:

> . . . The statement of exceptions shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Where possible, designate by page citation or exhibit number the portions of the record relied upon for each exception;
>
> (4) State the grounds for each exception.
>
> . . .
>
> (c) An exception not specifically urged shall be waived.

[7] Because we find that Keegan represented CTA, we need not consider whether the Hourly Faculty Senate is an "employee organization" within the meaning of the Act.

[8] In its Answer to the Charge, the District "affirmatively alleges the matters grieved related entirely to legal interpretations of Education Code sections 87482 and 87604 and the California Supreme Court decision in *Peralta Federation of Teachers v. Peralta Community College District."*

GLUCK, Chairperson, dissenting: It is well established that adverse employer action which is motivated by "anti-union" animus1 violates EERA subsection 3543.5(a)2 Thus, the employer may successfully defend against an unfair practice charge of this kind by demonstrating some legitimate reason for its action. But, the threshold question - and the charging party's burden to prove by a preponderance of the evidence - is whether such unlawful intent existed.

As the majority points out, proof of unlawful motive can rarely be established by direct evidence. Consequently, where discrimination or reprisal is claimed, it is this Board's task to determine from the surrounding factual circumstances whether the employer's action was animated by an intention to "punish" the charging party for its exercise of rights protected by EERA. Not infrequently, such a determination requires the interpretation of contradictory or ambiguous evidence.

Here, two aspects of the evidence which the majority finds damaging to the District's defense are Hannan's criticism of Keegan following her appearance at the January 28 Trustees' meeting3 and the proximity of time between that appearance and the Trustees' rejection of the two contracts. I do not find either to be that telling.

Hannan's remarks are ambiguous. The interpretation given them by the majority is unquestionably plausible and provides strong support for the conclusion the majority reaches. However, I find another interpretation to be at least equally plausible and less baleful. Hannan had arranged for these contracts, had promised that they would be approved, and had congratulated Couch who had already signed his. His remarks following her presentation, reflect unmistakable personal frustration over the disastrous effect of Keenan's appearance at the Trustee's meeting. They also reflect that the Trustees were angered, *but not what they were angry about.* Kennan's own testimony sheds some light on that.

She testified that when she stated to the Trustees that "no one . . . wants back-door contracts, but if that was the only way. . . . ," the Trustees "showed great consternation *at the mention of back-door contracts.*" (Emphasis supplied.) There is also testimony that Hannan referred to her comments as threatening the *validity* of those agreements. In view of some question about the propriety of granting the contracts in issue here, these bits of evidence raise a question as to whether the Trustees' action was meant to discipline Keegan or whether it was prompted by concern that the contracts, submitted to public exposure, were improper, or violated hiring policy.

I see the answer to that question as critical to the outcome of this case. An employer's reaction to protected speech may be adverse to the speaker's *interests,* yet not be unlawful within the meaning of subsection 3543.5(a). To find a violation of that provision based on a claim of reprisal, it is necessary that the adverse action be retaliatory, intended as "punishment" for the act of exercising the right of speech. Absent such underlying intent, the adverse effect of employer action would be only coincidental or "accidental." For example, assume unlawful financial support given a union by the employer; further, that an official of the union had unintentionally revealed that fact at a public meeting with the consequence that the employer then withdrew its support. The adverse impact on the union could well have resulted from the employer's effort to correct its mistake rather than from an intention to punish the union official for his indiscretion.

In *Novato,* PERB presented a number of criteria by which the presence of unlawful motive could be tested. One, *proximity of time,* is cited by the majority. I find this test inutile here. The Trustees were obligated to act on the proposed contracts. The matter was placed on its February 4 agenda, one week after Keegan's appearance. One may logically assume that the item was expedited as a consequence of her appearance without concluding that it was expedited for the purpose of reprisal. If the Trustees became concerned about the propriety of these agreements on January 28, when Keegan spoke, it would not be unexpected that they would act on them as soon thereafter as practical.

Furthermore, I find less significance in the timing of employer action4 which was anticipated *before* the protected activity took place than that which was not expected and appears to have occurred *because* of the protected activity.

I find the *other evidence* essentially directed towards the undisputed fact that back-door contracts had been issued and approved in the past. It makes no significant contribution to the determination of the reason why the Trustees rejected these two agreements.

It is true that the District offered no explanation for its action. Its silence would undoubtedly be fatal had the charging party established a prima facie case of discrimination or reprisal against Keegan because of her exercise of a protected right to represent CTA on a matter of employer-employee relations. But I do not find that to be the case. CTA has presented an ambiguous and inconclusive body of evidence from which different inferences may be drawn. For my part, I cannot find in that evidence a connection between Keegan's remarks and the Trustee's action which constitutes the kind of nexus contemplated by *Novato.* I would dismiss the complaint.

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1 The phrase "anti-union animus" represents something more than an attitude towards employee organizations. It speaks to hostility toward the exercise of any employee or organizational right granted by EERA.

2 *Novato Unified School District* (4/30/82) PERB Decision No. 210 and cases cited therein.

3 The ALJ credited CTA testimony that Hannan had said that Keegan "blew it" by her "injudicious remarks," had upset the Trustees, and that there would be no contract for her. Hannan denied having made such statements, but it is not necessary to reject the credibility finding to reach the result presented here.

4 I refer to the matter of *taking* action, not the nature of the action taken.